COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops	)	D.T.E. 03-59

COMMENTS OF
VERIZON MASSACHUSETTS

The *Triennial Review Order*[1] permits state commissions to petition for a waiver of the Federal Communications Commission's ("FCC") nationwide finding that competitive local exchange carriers ("CLECs") are not impaired without access to unbundled local switching for "enterprise" customers, *i.e.*, those customers served by high-capacity loops. The Department opened this proceeding on August 26, 2003, to consider "the applicability in Massachusetts of the FCC's finding that switching for business customers served by high-capacity loops should no longer be unbundled and … whether the Department should petition the FCC for a waiver of its finding."[2]

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1 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Report and Order, and Order on Remand and Further Notice of Proposed Rulemaking (rel. August 21, 2003). For purposes of these comments, we will assume that the rules promulgated pursuant to the *Triennial Review Order* will go into effect as scheduled. However, these comments are submitted without prejudice to Verizon's position that numerous provisions of the *Triennial Review Order* are contrary to law, and should be stayed and vacated by the courts. Of course, if the *Triennial Review Order* is stayed to any extent, the procedures recommended in these comments may no longer be relevant.

2 *Vote and Order Opening Proceeding* at 2.

In its *Vote and Order Opening Proceeding*, the Department took the following actions: (1) required any CLEC wishing the Department to proceed with an investigation to file by September 5, 2003, a "Request to Proceed;" (2) required those interested in participating in the investigation to file requests to participate stating with specificity their interest and the extent to which they would like to participate; (3) solicited comments on the scope, nature, and timing of any Department inquiry; (4) proposed a procedural schedule commencing from the effective date of the *Triennial Review Order*, in the event the Department did in fact conduct an investigation; and 5) scheduled a procedural conference in the docket for September 25, 2003. Verizon Massachusetts ("Verizon MA") submits these comments in response to the Department's order.

I. THE SCOPE, NATURE AND TIMING OF ANY DEPARTMENT PROCEEDING ARE FRAMED BY THE *TRIENNIAL REVIEW ORDER*.

In its *Triennial Review Order*, the FCC established "a national finding that competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above." *Triennial Review Order* ¶ 451. The FCC reached this conclusion because there are "few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above ... ."[3] *Id.*, ¶ 451. A state commission cannot ignore or overturn the FCC's conclusion. Instead, a

[3] The FCC's finding of no impairment for switching used to serve DS1 enterprise customers includes customers that are being served using a DS1 or above loop, as well as customers "for whom it could be economically feasible to serve using a DS1 or above loop." *Triennial Review Order* ¶ 451 n. 1376. The FCC has stated that defining these "potential" DS1 enterprise customers should be done in a state commission's nine month case. *Triennial Review Order* ¶ 451 n. 1376. These "potential" DS1 customers will be identified through a calculation of the point (based on the number of customer lines) at which it makes "economic sense for a multi-line customer to be served via a DS1 loop." *Triennial Review Order* ¶ 497. However, determining this "cross over" point does not necessarily alter any

state commission can only ask the FCC to waive its finding of no impairment; this waiver petition must be supported by specific facts, applied to economic and operational standards dictated by the FCC. *Id.*, 455. These standards are the same ones that the FCC already applied when it made its finding of no impairment. Any waiver request – which can come only from a state commission – must be filed with the FCC within 90 days from the October 2, 2003 effective date of the *Triennial Review Order*, *i.e.*, no later than December 31, 2003.[4]

The exclusive authority to request a waiver — and the exclusive responsibility to decide whether a waiver should be requested — lies with the Department (just as the exclusive authority to decide whether a waiver should be granted lies with the FCC). The process is not party-driven. Thus, it is the Department's responsibility to determine what process will best enable it to exercise its authority and discretion. The Department is not required pursuant to the *Triennial Review Order* to file a waiver request to maintain switching as an unbundled element for DS1 enterprise customers. Indeed, the FCC did not require that states even conduct a "90-day proceeding" to consider whether such a request should be made. Parties have no right to file a waiver request on their own or to

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impairment analysis for enterprise customers – it only affects the number of customers covered by the category. And so this identification process does not establish a separate basis for a 90-day case.

[4] The effective date of the *Triennial Review Order* is 30 days after publication in the *Federal Register*. *See* 47 C.F.R. § 1.427(a) ("Any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register except as otherwise specified in paragraphs (b) and (c) of this section."). Publication took place on September 2, 2003, and the 90-day period will thus tentatively begin on October 2, 2003. (The precise effective date is subject to approval by the Office of Management and Budget. *See Triennial Review Order* ¶¶ 780, 830.)

compel the Department to file such a request.[5] The *Triennial Review Order* explicitly limits waiver filings to state commissions "wishing to do so" and explicitly "permits," rather than requires, state commissions to make such filings. *Id.*, ¶ 455; *see also* Rule 319(d)(3)(i) (referring to a "state commission wishing to rebut the [FCC's nationwide non-impairment] finding").

If the Department were to proceed to conduct an inquiry in this case, the scope, nature, and timing of any such investigation are clear based on the FCC's *Triennial Review Order*. First, as to scope, the FCC has identified the factors that a state agency must examine in assessing whether it should petition to rebut the national finding of no impairment in this market. Specifically, the FCC has directed states to examine operational and economic factors that affect CLECs' ability to compete in the enterprise market without obtaining unbundled switching from ILECs, such as Verizon MA. Among the factors the FCC directs the states to address are:

- ?? Evidence of actual CLEC deployment and use of their own switches in the market
- ?? ILEC performance in provisioning high-capacity loops
- ?? The availability of collocation space in ILEC offices
- ?? Difficulties CLECs have experienced in obtaining cross connects from the ILEC
- ?? The potential revenues to CLECs from serving enterprise customers

See Triennial Review Order ¶¶ 454-458.

[5] *But see Triennial Review Order* ¶ 190 ("if a state commission fails to perform the granular inquiry we delegate to them, any aggrieved party may petition this Commission to step into the state's role.")

Moreover, the FCC has determined that states must consider these factors not just for particular CLECs but for the entire enterprise market encompassing all competitors or potential competitors. In short, it is not enough that a few carriers point to factors that may affect their particular business plans; if there is otherwise significant participation by other carriers in the market, there is no basis for rebutting the FCC's finding of no impairment. *Id.*, ¶ 115. The FCC has stated that it "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired." *Id.*

Second, the nature of the case requires that the Department gather relevant information bearing on the factors the FCC has identified concerning impairment so that it can assess whether to file a waiver petition with the FCC. Since it is the Department that will bear the burden at the FCC, it must be thoroughly satisfied that it can prove an impairment case. The role that the Department plays here is thus not its traditional one of adjudicating a particular dispute between parties that falls within the adjudicatory procedures of G.L. c. 30A. Rather, the Department's role is very similar to what it was in the Section 271 process – the Department is gathering facts on which it will rely to support a recommendation to the FCC, if it chooses to make one. As such, the Department should, like in the Section 271 proceeding (D.T.E. 99-271), tailor its procedures to ensure that it obtains all necessary, relevant information in an efficient and fair manner in order to evaluate whether it should seek a waiver. One such procedural mechanism – having all discovery to intervenors and non-intervenors issued through the Department – was suggested in the *Vote and Order Opening Proceeding*. Verizon MA concurs with that approach. Indeed, since the self-provisioning of switching by CLECs in

this market is a key factor that the Department must consider, it is in the best position to obtain such information from all carriers, even if some elect not to participate in the case. Likewise, the Department should use the hearings as its vehicle for obtaining facts or clarifying issues that it believes necessary to inform its determination. Thus, as in D.T.E. 99-271, the Department should reserve its right to limit participants' examination of witnesses.

Finally, as noted above, the FCC has directed state commissions to file any waiver petition for the enterprise switching market by December 31, 2003 (90 days following the effective date of the *Triennial Review Order*). In its order opening the docket and in a subsequent Hearing Officer Memorandum (*see* Procedural Memorandum dated September 9, 2003), the Department proposed a procedural schedule designed to complete the proceeding within the 90-day period. Generally, Verizon MA believes the schedule is reasonable if adjusted to allow for one additional week between the filing of direct and rebuttal cases, tentatively scheduled for October 23rd and October 30th, respectively. The direct cases of other participants will be the first time the Department and Verizon MA are apprised of the factual bases for the claim of impairment for enterprise switching.[6] A week between the filing of those cases and when rebuttal presentations are due, as set forth in the tentative schedule, may be insufficient for information to be gathered to address particular claims. Adjusting the schedule to provide for the filing of rebuttal cases on November 6th will not affect any other portion

[6] Verizon MA does not anticipate filing a direct case since it has no burden of producing evidence to support the FCC's finding of no impairment in the enterprise switching market.

of the schedule and will better ensure development of a complete record for the Department's evaluation.

II. ALTHOUGH THE DEPARTMENT HAS OPENED THIS PROCEEDING, IT SHOULD NOT PROCEED FURTHER WITH AN INVESTIGATION.

In response to the Department's request that CLECs wishing the Department to consider rebutting the national finding of no impairment to file a "Request to Proceed" by September 5, 2003 (*see Vote and Order Opening Proceeding* at 3), only three CLECs made such a filing – American Long Lines Inc., DSCI Corporation, and InfoHighway Communications Corporation.[7] The fact that so few CLECs filed requests in this case should cause the Department to reassess now whether there is any reason to proceed with this investigation.

In Verizon's entire footprint, it has provided *hundreds of thousands* of "high capacity" loops to CLECs, and of this number, *less than one percent* are being provided in conjunction with a Verizon switch. In Massachusetts, Verizon is currently providing more than 5,000 DS1 UNE loops, but only 37 DS1 loops are provided with Verizon MA switching – a mere 0.7 percent. Remarkably, this minute percentage actually overstates

[7] Allegiance Telecom, Inc. ("Allegiance") also filed comments stating that, although it was not asking the Department to rebut the FCC's finding regarding enterprise switching, the Department should its position on Verizon MA's adherence to FCC rules on provisioning UNE DS1 loops. Specifically, Allegiance asserts that Verizon MA "has a history of improperly refusing to provide UNE DS1 loops on the grounds that it does not have facilities available to provide such loops" (Allegiance Comments at 2). This claim is without merit. Verizon has not improperly refused to provision DS1 loops. In several 271 decisions, the FCC ruled that Verizon's "no facilities" policy did not violate any commission rules. *See Verizon Virginia Order*, ¶ 141; *Verizon New Hampshire/Delaware Orde*r, ¶¶ 112-14; *Verizon New Jersey Orde*r, 17 FCC Rcd at 12349-50, ¶ 151; *Verizon Pennsylvania Orde*r, 16 FCC Rcd at 17469-70, ¶¶ 91-92. The FCC has revised its rules in the *Triennial Review Order* to now require incumbent LEC to "make the same routine modifications to their existing loop facilities that they make for their own customers." *Triennial Review Order* ¶¶ 633-635. Verizon MA will comply with the FCC's new requirement, and there is no basis for the Department to assume otherwise by placing conditions on its review here.

the extent to which CLECs are using Verizon MA switches in conjunction with high-capacity loops, since it does not include any of the large number of high-capacity loops that CLECs provide themselves and to each other.

There is a simple explanation for why CLECs are declining Verizon MA's unbundled switching – they are using their own switches. The FCC concluded there is "significant nationwide deployment of switches by competitive providers to serve the enterprise market . . . ." *Id.*, ¶ 435. The FCC based this conclusion on the fact that CLECs "have deployed as much as 1,300 local circuit switches and are primarily utilizing these switches to serve enterprise customers." *Id.*, ¶ 421 n. 1395. By any definition of the word, CLECs are not "impaired" without the use of Verizon MA's switches for these high-capacity loops. Access to Verizon MA's unbundled switches cannot be a barrier to entry in this market, since no virtually all of the loops that make up this market, CLECs have affirmatively *declined* to use a Verizon switch. Indeed, as noted above, only a miniscule number of high-capacity loops have been ordered from Verizon MA with the switching element. Thus, to the extent that high-capacity loops *are* being used by CLECs in Massachusetts, they are being used in conjunction with the CLECs' *own* switches. Under even the most permissive understanding of the term, there cannot be "impairment" under these circumstances. It is no doubt for this reason that some of the largest users of UNE-P in Massachusetts have chosen not to ask the Department to challenge the FCC's impairment conclusion for enterprise customers.

The fact that CLECs have declined to use Verizon MA switching for virtually all of the high-capacity loops they have purchased cannot be refuted by the purported "needs" of only three of the many CLECs operating in Massachusetts. As mentioned

above, the FCC has determined that it "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired." *Triennial Review Order* ¶ 115. Nothing in the *Triennial Review Order* requires that the Department undertake a review here, and it should decline to do so given that the overwhelming majority of CLECs see no need to pursue such a review because they are addressing this market via their own switches.

CONCLUSION

If the Department proceeds with this investigation, the scope, nature, and timing of the case has been clearly established in the *Triennial Review Order*. The FCC concluded that CLECs are not impaired if switching in the enterprise market is not provided as an UNE and directed states wishing to rebut that finding to file waiver petitions by December 31, 2003. The factors the Department must examine to support a waiver petition are detailed in the *Triennial Review Order* and will require the assembly of significant factual data from numerous carriers in Massachusetts. However, there is nothing in the FCC's order that requires that the Department undertake this investigation. Given that many CLECs in Massachusetts are providing their own switching in the enterprise market and only three carriers have requested that the Department consider the

issue, the Department should not proceed further to address whether it may wish to rebut the FCC's finding of no impairment.

Respectfully submitted,

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